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Bursey v. United States: The First and Fifth Amendments in the Grand Jury Room

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BURSEY v. UNITED STATES: THE FIRST AND FIFTH AMENDMENTS IN THE GRAND JURY ROOM

On November 15, 1969, David Hilliard, Chief of Staff of the Black Panther Party, addressed a Moratorium Day rally against the war in San Francisco and received national notoriety when he proclaimed to the large crowd, "We will kill Richard Nixon." As a result of that speech, a federal grand jury began investigations into a possible plot to assassinate the President of the United States. It immediately focused its attention on the *Black Panther Newspaper*, which had reprinted the entire Hilliard speech in two separate issues on other occasions and had highlighted articles supporting its sentiments. In addition, on May 2, 1970, the paper printed an article by Eldridge Cleaver entitled "To My Black Brothers in Viet Nam," in which he urged black soldiers to kill "the racist pigs . . . giving you orders."[1] Attempting to discover the role of the newspaper's staff in the alleged plot, the grand jury subpoenaed two employees of the paper.

These employees, Sherrie Bursey and Brenda Joyce Presley, appeared before the grand jury five different times over a peiod of ten months, fielding questions about the inner operations of the *Black Panther Newspaper*. The witnesses answered all questions except those requiring identification of the newspaper's personnel and information on the activities and overseas travels of certain party members.[2] In attempting to compel answers to these questions, the United States

1. This reference to the Cleaver article is given only as background information. When the article was printed in the Black Panther Newspaper on May 2, 1970, the grand jury used it as a basis for expanding its investigation to include 18 U.S.C. § 2387 (interference with the armed forces). However, the focal point of the grand jury probe was Hilliard's speech and the potential threat it posed. Consequently, in the ensuing discussion of matters arising out of the grand jury investigation reference will only be made to Hilliard's speech and not to Cleaver's article.

2. The questions here in dispute are those addressed to the witnesses at the September 10, 1970 session. Bursey v. United States, 466 F.2d 1059, 1069-70 (9th Cir. 1972). The disputed questions are those asked the witnesses at the September 10, 1970 session. Several of them had been put to the witnesses at prior sessions of the grand jury and had been answered. For example, question number 21 (Bursey) was answered at the June 4, 1970 session and questions number 23 and number 24 (Presley) were answered at the May 13, 1970 session. This fact gave rise to the ancillary issue of whether the witnesses could review their past grand jury testimony to aid them in determining what questions they had already answered and to what extent they had answered them. This point is not discussed herein but can be re-

Attorney conducting the investigation submitted an application to the federal district court, requesting a grant of immunity for the witnesses in accordance with the Omnibus Crime Control and Safe Streets Act of 1968.[3] The court, in granting the request, instructed the witnesses to answer all questions relevant to the investigation, but, even under threat of contempt, they still refused. At the resulting contempt hearing, the witnesses argued that the questions they were required to answer violated their First and Fifth Amendment rights. Nevertheless, Bursey and Presley were cited for contempt and the case of *Bursey v. United States*[4] is an appeal from that order.

The issues emanating from the appeal raise certain questions about the scope and power of the First and Fifth Amendment privileges in the United States Constitution.[5] Specifically, they deal with (1) the comprehensiveness of the Omnibus Crime Control Act's immunity statute and (2) the scope of the First Amendment in a grand jury proceeding. This note will first examine the different approaches used by various courts in interpreting immunity statutes and list the reasons for preferring the *Bursey* court's approach. Second, the court's disposition of the First Amendment issue will be analyzed in terms of its basic weaknesses and the recent United States Supreme Court decision of *Branzburg v. Hayes*.[6]

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searched in such cases as *In re* Bonanno, 344 F.2d 830 (2d Cir. 1965) (witness reviewing another witness' testimony); *In re* Russo, 53 F.R.D. 564 (C.D. Cal. 1971) (witness reviewing his own testimony); United States v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968) (defendant seeking testimony for his defense preparation). For a general discussion of the subject, see Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 JOHN MARSH. J. PRAC. & PROC. 18 (1967).

3. 18 U.S.C. § 2514 (1970) reads in pertinent part: "Whenever in the judgment of a United States attorney the testimony of any witness . . . in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify . . . and upon order of the court such witness shall not be excused from testifying . . . on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled . . . to testify . . . ."

4. 466 F.2d 1059 (9th Cir. 1972).

5. One other issue in the case, not discussed in this note, involved due process. The due process issue resulted from the contempt citation being issued to include certain questions which had been answered by the witnesses in previous grand jury sessions (see note 2 *supra*) and certain questions which had been expressly excluded from the grant of immunity. The court ruled that the witnesses could not be held in contempt for refusal to answer these questions. *Id.* at 1079-81.

6. 408 U.S. 665 (1972).

The Scope of Immunity

Under 18 U.S.C. section 2514[7] immunity can be granted to a witness testifying "in any case or proceeding before any grand jury or court of the United States involving any violation of . . . any of the offenses enumerated in section 2516,[8] or any conspiracy to violate . . . any of the offenses enumerated in section 2516 . . . ."[9] In the grand jury's investigation, only one of the five statutes[10] involved in the probe—18 U.S.C. section 1751 dealing with presidential assassination, kidnapping, and assault—was listed in section 2516; it was solely on the basis of that statute that immunity was requested and granted. With that fact in mind, Bursey and Presley contended that the only questions they should be required to answer were those dealing directly with the subject matter of section 1751 since their immunity extended only that far.[11] On the other hand, the government argued that, once they had been immunized under section 2514, the witnesses were immunized as to any and all inquiries put to them by the grand jury.[12]

The court rejected both of these formulas, advancing a third which required that before a witness can be compelled to answer a disputed interrogatory, that interrogatory must be relevant to the subject matter for which the witness was granted immunity.[13] Under this

7. This confers so-called transactional immunity which prevents a witness from being prosecuted for the crimes concerning which he testified. For a view into the development of this statute, see Ullman v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892); *In re* Bart, 304 F.2d 631 (D.C. Cir. 1962). *See generally* S. REP. No. 1097, 90th Cong., 2d Sess. (1968); Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 YALE L.J. 1568 (1963).

8. 18 U.S.C. § 2516 (1970) of the Omnibus Crime Control and Safe Streets Act of 1968 lists numerous statutes through which the immunity statute (section 2514) can be invoked. In the vast majority of investigations employing section 2514, one or more of the statutes listed in section 2516(c) is involved. Such is the case in *Bursey*. Some of the most commonly investigated statutes in subsection (c) are 18 U.S.C. §§ 224 (bribery in sporting contests), 1084 (transmission of wagering information), 1751 (presidential assassination, kidnapping, or assault), 1952 (interstate racketeering), 2314 and 2315 (interstate transportation of stolen property).

9. Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2514 (1970).

10. The grand jury investigation included 18 U.S.C. §§ 2 (general aiding and abetting statute), 371 (general conspiracy statute), 871 (threats against President and successors to the Presidency), 1751 (presidential assassination, kidnapping, and assault), and 2387 (interference with armed forces—see note 1 *supra*).

11. Bursey v. United States, 466 F.2d 1059, 1073 (9th Cir. 1972).

12. *Id.*

13. *Id.* at 1073-76. The difference between appellants' approach and that adopted by the court is one of emphasis. That is, appellants' approach would require the court to set firm limits on the grand jury as to what it could and could not ask appellants. Such a suggestion is contrary to long-standing grand jury procedures:

approach, the relevance of the question was determined by whether it fit within the limits of the immunity statute and not the scope of the grand jury's investigation. In applying this concept to the situation in *Bursey*, the court said:

> We assume that all of the questions that the witnesses refused to answer were relevant to possible offenses which the grand jury might properly investigate. The issue is, however, were the questions relevant to an investigation of possible violations of section 1751?[14]

The popularity of this approach to the interpretation of immunity statutes is by no means universal.[15] The Third Circuit developed a formula which places emphasis on whether the disputed interrogatory comes within the ambit of the grand jury investigation rather than the subject matter of the immunity statute. This approach began its development with *Marcus v. United States*,[16] a case arising out of a grand jury probe into possible violations of federal gambling and racketeering statutes and the Federal Communications Act.

Marcus, who had been immunized under the immunity statute in the Federal Communications Act,[17] alleged that since his immunity extended only to violations of that act, he could not be required to answer questions dealing with violations of the other statutes. In denying this allegation, the court first noted that all the questions, though dealing with gambling and racketeering violations, were linked to the Federal Communications Act[18] and thus were covered by the immunity

"It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly." Blair v. United States, 250 U.S. 273, 282 (1919); *see generally* Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961). On the other hand, the court's approach does not interfere with the grand jury process until a witness has refused to answer and the court is called upon to compel those answers.

14. Bursey v. United States, 466 F.2d 1059, 1077 (9th Cir. 1972).

15. Cases utilizing a different approach are: *In re* Grumbles, 453 F.2d 119 (3d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972); *In re* Giancana, 352 F.2d 921 (7th Cir. 1965); United States v. Testa, 326 F.2d 730 (3d Cir. 1963), *cert. denied*, 376 U.S. 931 (1964); Marcus v. United States, 310 F.2d 143 (3d Cir. 1962), *cert. denied*, 372 U.S. 944 (1963); *In re* Lane, 224 F. Supp. 317 (N.D. Ill. 1963).

16. 310 F.2d 143 (3d Cir. 1962).

17. 47 U.S.C. § 409(*l*) (repealed 1970) reads in pertinent part: "No person shall be excused from attending and testifying . . . in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter . . . on the ground or for the reason that the testimony . . . required of him may tend to incriminate him or subject him to a penalty or forfeiture."

18. The "link" between the Federal Communications Act and 18 U.S.C. § 1084 and other gambling and racketeering statutes is that when one conducts illegal business over the telephone (such as transmitting wagering information), he causes the telephone company to violate the law, *i.e.*, a provision in its tariff prohibits the phone company from allowing its phones to be used for illegal purposes, and, under the Federal Communications Act, it is against the law to cause the phone company to

statute. The court went on to intimate, however, that the effectiveness of the immunity was not limited to those questions linked to the Federal Communications Act. In broad language the court asserted that the reference in the immunity statute to violations of the Federal Communications Act "limits only the class of witnesses to whom the immunity will attach, not the scope of the immunity conferred"[19] and, further, that "the immunity is as extensive as the testimony."[20]

Despite this broad language, there is some confusion as to what *Marcus* actually says. The fact that all the disputed interrogatories fell within the subject matter of the immunity statute has caused some courts to cite *Marcus* as authority for requiring all interrogatories to come within the purview of the applicable immunity statute.[21] Nevertheless, subsequent Third Circuit cases building upon *Marcus* clearly indicate that it is to be read as requiring only that disputed questions fit within the scope of the grand jury investigation.

In *United States v. Testa*,[22] the Third Circuit began to clarify the *Marcus* decision. The factual situation in that case was almost identical to *Marcus*, with the grand jury investigating gambling and racketeering operations by utilizing the immunity statute of the Federal Communications Act. The opinion is only a short per curiam statement requiring the appellant to answer all questions and citing *Marcus* as authority for that order. The dissent, however, provides some insight into the extensiveness of the opinion and the broad reading given to *Marcus* by the court. In asserting support for the *Marcus* decision, the dissent explained the essential difference between that case and *Testa*:

> In Marcus . . . we were evidently satisfied that the nature of the questions left no doubt as to the object of the inquiry. The instant case falls far short of Marcus in this report.
>
> Further, it is not clear by any means how the Federal Communications Act is here involved.[23]

If the dissenting opinion accurately represented the nature of the disputed questions, then the court's opinion compelled answers to questions within the scope of the grand jury's investigation with but a tenuous relation to the Federal Communications Act.[24] That this is an

violate the law. United States v. Testa, 326 F.2d 730, 733-34 (3d Cir. 1963) (Kalodner, J., dissenting), *cert. denied*, 376 U.S. 931 (1964).

19. Marcus v. United States, 310 F.2d 143, 147 (3d Cir. 1962), *cert. denied*, 372 U.S. 944 (1963), *quoting* Brown v. United States, 359 U.S. 41, 47 (1959).

20. Marcus v. United States, 310 F.2d at 146-47.

21. United States v. Harris, 334 F.2d 460 (2d Cir. 1964), *rev'd on other grounds*, 382 U.S. 162 (1965); United States v. Testa, 326 F.2d 730 (3d Cir. 1963) *cert. denied* 376 U.S. 931 (1964) (Kalodner, J., dissenting).

22. 326 F.2d 730 (3d Cir. 1963).

23. *Id.* at 733 (Kalodner, J., dissenting).

24. Judge Kalodner said: "In this case, the questions put to the appellant were not self-revealing; he was asked whether he owned, rented or visited a summer place

accurate representation of the case can be seen in a 1971 Third Circuit case which clearly enunciated the dominating attitude in the Third Circuit.

That case, *In re Grumbles*,[25] brought into dispute 18 U.S.C. section 2514,[26] the immunity statute of the Omnibus Crime Control Act. Implementation of this section requires that one of the statutes listed in 18 U.S.C. section 2516[27] be under investigation. Appellants contended that no such statutes were involved in the grand jury's inquiry, but to the extent that a particular statute was, they were only immunized as to the questions dealing with that crime. The court reviewed the disputed questions and determined that (1) they "appear[ed] to extend to possible violations of 18 U.S.C. § 793,"[28] a statute listed in section 2516, and (2) the immunity thus granted under section 2514 was not restricted to questions falling within the subject matter of section 793:

> Once the Grumbles are granted immunity pursuant to 18 U.S.C. § 2514, they obtain full immunity as to everything arising out of that inquiry, including acts which might constitute a violation of other statutes under investigation.[29]

The court then quoted *Marcus*: "The immunity is as extensive as the testimony."[30]

As in the *Marcus* and *Testa* cases, the court in *Grumbles* used the scope of the grand jury investigation rather than the expressed limits of the immunity statute to determine the relevance of the disputed interrogatories. The practical effect of this approach is to extend the

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in New Jersey, whether he made certain specific calls to specific numbers, and, as to some, whom he spoke to and the purpose. Nothing is apparent from these questions, least of all that they concerned any alleged violation of the Federal Communications Act, as in Marcus.

. . . .

"I have two reservations which are, to me, stumbling blocks to the acceptance of our conclusion in this case. First, unlike Marcus, the questions here involved do not in any way whatsoever show any alleged violation of the Federal Communications Act. And the mere use of a telephone for interstate communication does not, *ipso facto*, involve that Act. Second, if the Government is here suggesting that an illegal conversation over the telephone . . . puts the telephone company in violation of its tariff so that the user is in violation . . . then the Government is going beyond Marcus, or any other case I have been able to find, and a new issue is *presented not reached* by our Marcus decision." *Id.* at 732, 734.

25. 453 F.2d 119 (3d Cir. 1971).

26. See note 3 *supra*.

27. See note 8 *supra*.

28. *In re* Grumbles, 453 F.2d 119, 121 (3d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

29. *Id.* at 122.

30. *Id. quoting* Marcus v. United States, 310 F.2d 143, 146-47 (3d Cir. 1962).

coverage of an immunity statute far beyond its subject matter.[31] A partial justification for such extensions can be found in the language of the statutes themselves which purport to apply to any proceeding "involving" certain specific statutes or to any proceeding "growing out of" a particular statute.[32] The immunity statute applies to the proceeding, and a proceeding "growing out of" the possible violation of a particular statute can grow to encompass the investigation of possible violations of other, perhaps unrelated, statutes.

This approach to immunity statutes is not confined to the Third Circuit but may be found in other jurisdictions as well.[33] The Seventh Circuit case of *In re Giancana*[34] granted immunity under the Federal Communications Act "to any transaction, matter or thing as to which appellant might be interrogated before the grand jury,"[35] even though the Federal Communications Act was only one of several statutes under investigation by the grand jury. An Illinois federal district court held in *In re Lane*[36] that the immunity statute under the Federal Communications Act gave the appellant "an immunity which will extend to any crime whatsoever which she testifies to or about."[37]

The Second Circuit, in such cases as *United States v. Harris*[38] and *United States v. Tramunti*,[39] has also incorporated elements of the Third Circuit approach into its decisions.[40] In *Harris*, where the fac-

31. "Subject matter" is here used in its strict sense to mean the subject matter of the chapter within which the immunity statute is located. For example, the subject matter of 47 U.S.C. § 409(*l*) would be all matters contained within the Federal Communications Act but no more.

32. Another phrase often present in immunity statutes and used by courts to give them a broad reading is the phrase which grants immunity "for or on account of any transaction, matter or thing concerning which [the witness] is compelled . . . to testify." 18 U.S.C. § 1406 (repealed 1970). For the effects that such language has on the courts, see Kastigar v. United States, 408 U.S. 931 (1972); Reina v United States, 364 U.S. 507 (1960); Brown v. Walker, 161 U.S. 591 (1896).

33. *In re* Giancana, 352 F.2d 921 (7th Cir. 1965); *In re* Lane, 224 F. Supp. 317 (N.D. Ill. 1963); *cf.* United States v. Neiberger, 460 F.2d 290 (6th Cir. 1972); *In re* Russo, 448 F.2d 369 (9th Cir. 1971).

34. 352 F.2d 921 (7th Cir. 1965).

35. *Id.* at 924 n.5.

36. 224 F. Supp. 317 (N.D. Ill. 1963).

37. *Id.* at 318.

38. 334 F.2d 460 (2d Cir. 1964), *rev'd on other grounds*, 382 U.S. 162 (1965).

39. 343 F.2d 548 (2d Cir. 1965), *vacated on other grounds sub. nom.* Castaldi v. United States, 384 U.S. 886 (1966).

40. The Sixth Circuit and the Ninth Circuit have also shown an inclination to follow the Third Circuit. There are, however, no cases directly in point. *Cf.* United States v. Neiberger, 460 F.2d 290 (6th Cir. 1972); *In re* Russo, 448 F.2d 369 (9th Cir. 1971); Licata v. United States, 429 F.2d 1177 (9th Cir.), *vacated on other grounds*, 400 U.S. 938 (1970); Wirtz v. Robb, 346 F.2d 192 (6th Cir. 1965); United States v. Coplon, 339 F.2d 192 (6th Cir. 1964).

tual situation was very similar to that in *Marcus*,[41] the court cited *Marcus* with favor[42] and required the appellant to answer all disputed questions. Unlike *Marcus*, however, the *Harris* court based its decision on the relevance of the questions to the immunity statute.[43] The court said that the "immunity extends to all testimony thus compelled insofar as that testimony bears a substantial relation to the subject matter of the immunity provision."[44] In *Tramunti*, the witness refused to answer questions dealing with gambling offenses because his immunity extended only to narcotics violations.[45] Basing its decision on the "substantial relation"[46] doctrine as stated in *Harris*, the court ordered the appellant to answer all of the questions, stating that gambling is related to narcotics as a possible means of securing money to purchase narcotics. This "substantial relation" between narcotics and gambling, however, could be applied to narcotics and numerous other federal offenses; it thus seems probable that such a test would yield the same result as in similar cases heard in the Third Circuit.

Despite the results of some of its cases, however, the Second Circuit requires the showing of a substantial relation between the disputed interrogatories and the subject matter of the immunity statute,[47]

41. In both *Harris* and *Marcus*, all of the disputed interrogatories fell within the subject matter of the immunity statute.

42. Harris v. United States, 334 F.2d 460, 463 (2d Cir. 1964).

43. *Id.* at 462.

44. *Id.*

45. Immunity was granted under 18 U.S.C. § 1406 (repealed 1970) which read in pertinent part: "Whenever in the judgment of the United States attorney the testimony of any witness . . . in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code . . . .

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or

(3) [21 U.S.C. § 184a],

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify . . . and upon order of the court such witness shall not be excused from testifying . . . on the ground that the testimony . . . may tend to incriminate him or subject him to a penalty or forfeiture."

46. This formula for defining the scope of an immunity statute is usually stated in words to this effect: "the immunity extends to all testimony thus compelled insofar as that testimony bears a *substantial relation* to the subject matter of the immunity provision." United States v. Harris, 334 F.2d 460, 462 (2d Cir. 1964), *rev'd on other grounds*, 382 U.S. 162 (1965) (emphasis added). For an explanation of this doctrine, see *In re* Bart, 304 F.2d 631, 637 n.20 (D.C. Cir. 1962).

47. This was most recently seen in the Second Circuit case of *In re* Vericker, 446 F.2d 244 (2d Cir. 1971), where the government was denied its request for immunity under 18 U.S.C. § 2514 because the subject matter of the questions (stolen F.B.I. documents) did not bear a substantial relation to the subject matter of the statute

an approach very similar to that used by the *Bursey* court. *Harris* and *Tramunti* illustrate the similarity of results which occur in the practical application of the Third Circuit approach and the *Bursey* approach,[48] and in most cases both views allow the grand jury wide latitude within certain nebulous boundaries.[49] Only when the grand jury's investigation far outstrips its originally stated objectives do the distinctions between the two views become important.

In situations, such as *Bursey*,[50] the more restrictive nature of the *Bursey* approach becomes apparent.[51] The Ninth Circuit's demand that the government show a relationship between the questions propounded and the statutory subject matter of the immunity grant allows it to work more in the best interests of both government and witnesses than does the Third Circuit's approach. The government is given some protection against unwittingly extending immunity to someone it has already decided to prosecute.[52] On the other hand, a witness may be spared the "embarrassment, infamy, or reprisal" attaching to some who testify before a grand jury.[53]

The First Amendment Questions

Of the questions held to be under the aegis of the immunity grant,[54] all threatened to infringe the witnesses' First Amendment guar-

under investigation, section 2314, in that the documents were not items with a worth of $5,000 or more ordinarily bought and sold in interstate commerce. *Id.* at 247; *cf.* United States v. Pappadio, 346 F.2d 5 (2d Cir. 1965).

48. On a motion for rehearing of the *Bursey* case, Judge Hufstedler (author of the *Bursey* opinion) pointed out that the Third Circuit approach was based almost entirely on its interpretations of 47 U.S.C. § 409(*l*) of the Federal Communications Act and that it probably would not construe 18 U.S.C. § 2514 in the same manner, implying, at least, that the two views are not as divergent as they might seem. Bursey v. United States, 466 F.2d 1059, 1091 (9th Cir. 1972). *But see In re* Grumbles, 453 F.2d 119 (3d Cir. 1971).

49. *Compare* Carter v. United States, 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970), *with In re* Giancana, 352 F.2d 921 (7th Cir. 1965).

50. In *Bursey*, the grand jury investigation began as a probe into a possible conspiracy to kill the president and expanded into a concurrent investigation of alleged attempts to interfere with the operations of the military. Bursey v. United States, 466 F.2d 1059, 1077 (9th Cir. 1972).

51. *Compare In re* Vericker, 446 F.2d 244 (2d Cir. 1971) *with In re* Lane, 224 F. Supp. 317 (N.D. Ill. 1963).

52. *Cf.* United States v. Charles Pfizer & Co., 245 F. Supp. 801 (S.D.N.Y. 1965).

53. *In re* Evans, 452 F.2d 1239, 1250 (D.C. Cir. 1971).

54. Bursey v. United States, 466 F.2d 1059, 1077-79 (9th Cir. 1972). The court found fifteen of the questions irrelevant to the subject matter of the immunity grant. Of these fifteen, four concerned the overseas travels of various Panthers, five dealt with the Cleaver article, and one with possible plans to assassinate state and federal judges. Another five questions, dealing with both the Hilliard speech and the Cleaver article, were adjudged irrelevant until such time as they were restructured to eliminate the reference to the Cleaver article.

antees. For the purpose of analyzing these infringements, the *Bursey* court categorized the questions into those relating substantially to the right of freedom of association and those relating substantially to the right of freedom of the press. Though it asserted that all of the disputed questions cut to some extent into freedom of association,[55] the court analyzed only five from that perspective.[56] The majority of the remaining questions were discussed in terms of their infringements upon the witnesses' rights to freedom of the press.[57]

The court's analysis of the problem in this manner is both able and expert. Nevertheless, in light of the recent United States Supreme Court case of *Branzburg v. Hayes*[58] and its possible effect on future cases similar to *Bursey*, this portion of the note will discuss the possibility of avoiding the *Branzburg* effects by applying the law under freedom of association to *all* the disputed questions, instead of just five. The first subsection will be a critical analysis of the court's disposition of the five questions under the associational privacy doctrine.[59] The

55. *Id.* at 1085. "Inquiries about the identity of persons with whom the witnesses were associated on the newspaper and in the Black Panther Party (Bursey questions 1-24; Presley questions 1-14, 27-31) infringed the right of associational privacy." As to the remaining thirteen questions, the court said "Presley questions 15-17, 26, 27 concerning possession of firearms, guerrilla training, etc., and Presley questions 18-25 concerning conversations about weapons and threats peripherally affect freedom of expression and association." *Id.* at 1086 n.20.

56. *Id.* at 1086-87. The five questions were as follows: "21. Name the members of the Black Panther Central Committee." (asked of Bursey); "28. Do any funds which are used for travel by Party leaders come from any foreign government? 29. Do you know whether any of the funds used for travel by Party leaders come from any foreign government? 30. Do you know whether any Black Panthers have been in contact with representatives of the Palestine Liberation Front or the Al Fatah movement? 31. Have any Black Panthers contacted the Palestine Liberation Front or the Al Fatah movement in connection with getting guerrilla training?" (All asked of Presley). *Id.* at 1069-70.

57. *Id.* at 1087-88. Four questions (Bursey 22-24, dealing with the overseas travels of Party members, and Presley 27, probing the Party's travel fund) were placed in "a class by themselves." The court declared them too broad and declined to require Bursey and Presley to answer them. The court viewed these questions as analogous to questions infringing associational privacy. "To require a member of an association, especially a dissident political party, to reveal the details of its funding is as effective a chilling device as is compulsory disclosure of its membership lists." *Id.* at 1088.

58. 408 U.S. 665 (1972). *Branzburg* was a trilogy of cases involving news gatherers who were called upon by grand juries to reveal the sources of information they had gathered. As will be developed later in the text, the broad but purposeful language of Mr. Justice White (author of the *Branzburg* opinion) effectively eliminated any remnants of what has been termed the "newsman's privilege" to maintain the confidentiality of his sources. For previous cases on this "privilege" see note 90 *infra*.

59. The associational privacy "doctrine" is formulated from several United States Supreme Court cases dealing with invasion of one's right to freedom of associa-

second subsection will deal with the weaknesses inherent in *Bursey*'s reliance on the freedom of the press doctrine[60] and the possible advantages of replacing it with the freedom of association doctrine.

Freedom of Association

In passing on those questions infringing the witnesses' rights to associational privacy, the court constructed an equation by which the needs of the government could be balanced against the infringement of the witnesses' First Amendment rights.[61] The equation, developed from past United States Supreme Court decisions on freedom of association, required the government to show that:

> [its] interest in the subject matter of the investigation is "immediate, substantial, and subordinating" [and] that there is a "substantial connection" between the information it seeks to have the

tion. In demonstrating a solicitous attitude towards this freedom, the Court has nevertheless carefully delineated the issues in those cases so that no one case or group of cases sets down a comprehensive statement of the "doctrine" of associational privacy. For purposes of this note and its discussion of the rights of an investigatory body to invade an individual's rights of association, the doctrine has been constructed from cases involving the public divulgence of an organization's membership list, *e.g.*, Bates v. Little Rock, 361 U.S. 516 (1960) and N.A.A.C.P. v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958), cases dealing with investigative committees and associational privacy, *e.g.*, DeGregory v. Attorney General, 383 U.S. 825 (1966) and Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963), and cases concerning statements of affiliations, *e.g.*, Baird v. State Bar, 401 U.S. 1 (1971) and Shelton v. Tucker, 364 U.S. 479 (1960).

60. Perhaps even more than the concept of freedom of association (see note 59 *supra*), freedom of the press has been very carefully separated by the United States Supreme Court into numerous categories. There are definite pronouncements by the Court concerning reporting of trials (Estes v. Texas, 381 U.S. 532 (1965)), attempts to influence judicial decisions (Craig v. Harney, 331 U.S. 367 (1947)), access to privileged information (Zemel v. Rusk, 381 U.S. 1 (1965)), payment of special taxes (Grosjean v. American Press Co., 297 U.S. 233 (1936)), regulation under the National Labor Relations Act (Associated Press v. N.L.R.B., 301 U.S. 103 (1937)), libel (New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), and confidentiality of sources (Branzburg v. Hayes, 408 U.S. 665 (1972)). Freedom of the press for the *Bursey* court, however, was composed of decisions from two other categories of this concept. The court viewed the problem as infringements on the right to publish and distribute literature freely, and proceeded to analyze the issues in light of cases dealing with those areas. For cases dealing with publication *see, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Winters v. New York, 333 U.S. 507 (1948); Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); Avins v. Rutgers, 385 F.2d 151 (3d Cir. 1967). For cases dealing with distribution, *see, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Talley v. California, 362 U.S. 60 (1960); Smith v. California, 361 U.S. 147 (1959); Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938).

61. Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972).

> witness compelled to supply and the overriding governmental interest in the subject matter of the investigation . . . .[62]

In explaining this approach, *Bursey* pointed out that the government need not establish that the testimony it desires will reveal criminal activity, "[h]owever, it is obliged to show that there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation."[63] Consequently, not only must the subject matter of the investigation be compelling and of an immediate, substantial, and subordinating interest to the government, but so too must be the subject matter of all the disputed questions.

Applying this formula, the *Bursey* court ruled that the government had successfully met its burden as to the five questions raising associational privacy objections. One of these questions asked for the names of the members of the Black Panther Party Central Committee.[64] The court allowed this infringement of the witnesses' associational rights, reasoning that if Hilliard was referring to a group of conspirators when he said "*we* will kill Richard Nixon," that group may have been the party leaders, the ones with whom he was most likely to have been in close contact.[65]

It seems equally probable, however, that Hilliard would also have been in close contact with the editors of the paper. Bursey's testimony revealed that the paper was the voice of the party, explaining to the public the party's programs and policies.[66] Several of the better known party members, including Hilliard himself, worked on the paper.[67] Hilliard's association with the newspaper's staff makes it just as likely that his alleged plot was hatched with them as with the Party's Central Committee. By allowing the names of the central committee to be released because "Hilliard would be likely to have had close communications"[68] with them is similarly to allow disclosure of the names of those on the newspaper staff, or those on any committee or in any other capacity with whom Hilliard could be shown to have associated. Such reasoning seems tantamount to allowing the government something approaching a membership list of the Black Panther Party. Based on past United States Supreme Court decisions, this would be an unjustified infringement on freedom of association.[69]

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62. *Id.*
63. *Id.*
64. See note 56 & accompanying text *supra.*
65. Bursey v. United States, 466 F.2d 1059, 1086 (9th Cir. 1972) (emphasis added).
66. *Id.* at 1068.
67. *Id.* at 1067.
68. *Id.* at 1086.
69. See note 59 & accompanying text *supra.*

A landmark case on this point was *N.A.A.C.P. v. Alabama ex rel. Patterson.*[70] In that case, the N.A.A.C.P. became embroiled in litigation with the state of Alabama which was trying to oust the organization for failure to comply with the conditions of a state statute regulating the business activities of foreign corporations. During the litigation, the N.A.A.C.P. was ordered to produce its state membership list, which it refused to do. Instead, it submitted the proper documents and paper work to bring itself into full compliance with the foreign corporations statute. The N.A.A.C.P. was fined $100,000 by the court for failure to produce the membership list but won a reversal before the United States Supreme Court. The Court was persuaded by the organization's argument that physical, economic, and social reprisals could be met by its members should their names become public. On this matter the Court stated, "[i]nviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs."[71] The Court required Alabama to show a subordinating and compelling interest in the membership list before infringement of the N.A.A.C.P.'s associational rights could be justified,[72] a burden the state was unable to satisfactorily meet.

Two years later, *Bates v. Little Rock*[73] again brought before the Supreme Court the question of requiring the N.A.A.C.P. to furnish a list of its members to a governmental agency pursuant to a state statute placing a license tax on certain organizations and businesses. Again, the Court refused to require divulgences of the membership list, finding no connection between it and the expressed purpose of the statute.

In 1963, the Court decided *Gibson v. Florida Legislative Investigation Committee*[74] in which the Court's commitment to the right of associational privacy was extended to infringements by investigative bodies.[75] There, the president of the Miami N.A.A.C.P. was called to testify before a state legislative committee investigating Communism in Florida. The witness was asked to appear with a list of his organization's members to which he could refer in determining whether

70. 357 U.S. 449 (1958).

71. *Id.* at 462.

72. *Id.* at 463-64.

73. 361 U.S. 516 (1960).

74. 372 U.S. 539 (1963).

75. For other cases dealing with the clash between First Amendment rights and the interests of an investigatory body, see DeGregory v. Attorney General, 383 U.S. 825 (1966); Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Uphaus v. Wyman, 360 U.S. 72 (1959); Barenblatt v. United States, 360 U.S. 109 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957).

certain known Communists were members of the Miami N.A.A.C.P.[76] Claiming infringement of associational privacy, the witness refused to appear with the list but did testify without it, revealing that none of the known Communists about whom he was interrogated were members of his organization. Though the state court held him in contempt, the Supreme Court failed to find "a substantial relation between the information sought and a subject of overriding and compelling state interest"[77] and upheld the witness's right not to produce the membership list.

The application of these principles to *Bursey* would place upon the government the burden of showing a substantial relation between members of the Black Panther Party and a possible plot to kill President Nixon. The government, however, was only able to show that Hilliard had made an inflammatory speech at a very emotional anti-war rally and that he asserted "*we* will kill Richard Nixon."[78] The government made no showing that Hilliard was announcing Panther policy or even that "Panther policy" had any binding effect on, or expressed the consensus of, the rank-and-file of the party.[79] Therefore, it would seem that an insufficient showing was made to allow the government what was in effect a means of obtaining the names of the party's membership. Nevertheless, as will be seen, the *Bursey* court refused to allow any further disclosures of the names of party members on the grounds that the information solicited by the grand jury was a clear invasion of freedom of the press. A discussion of the questionable utility of this theory follows.

Freedom of the Press and Branzburg v. Hayes

In order for the government to invade the constitutional right of freedom of the press, it was required by the *Bursey* court to make a slightly different showing than that made with respect to freedom of association. Essentially, the government had to show the existence of a substantial possibility that the newspaper staff published and distributed the Hilliard speech with the intent to commit the crime of pres-

76. There is no indication that the membership list was to be used for any other reason than as reference for the witness. Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 582 (1963) (Harlan, J., dissenting).

77. *Id.* at 546.

78. The government did introduce reports describing numerous violent confrontations between Black Panthers and police and the convictions of various Panthers for violent crimes in an attempt to establish a substantial relation between the Black Panther Party and an assassination plot. However, the court rejected that out of hand, saying, "It would not be hard to prove that registered Republicans and Democrats have been charged with crimes of violence, but that fact would raise no inference that other members of the same parties were violent. . . ." Bursey v. United States, 466 F.2d 1059, 1087 n.21 (9th Cir. 1972).

79. *Id.* at 1086.

idential assassination.[80] This required the government to show not only a substantial relation between Hilliard and the newspaper staff, but also a substantial possibility of the existence of intent to carry out the crime.

The more detailed showing required here to validate infringements into freedom of the press can be justified on the ground that historically the Court has viewed such attempted infringements as inimical and has dealt with them accordingly. Consequently, attempts to require a publisher to put his name on his material[81] or to require a pamphleteer to be licensed[82] have proved unsuccessful. Similarly, cases dealing with statutes outlawing obscene literature,[83] or creating certain regulatory commissions over such literature,[84] have also been unsuccessful. The *Bursey* court, then, refused to require the witnesses to answer the remainder of the questions because the government had failed to demonstrate a substantial possibility of intent.

Nonetheless, despite these successes in the courtroom, the press has suffered some failures. For example, it is strictly regulated in its methods of reporting judicial proceedings,[85] is not privileged to gain access to information not available to other citizens,[86] and is not exempt from coverage under the National Labor Relations Act.[87] Moreover, it recently has been determined by the Supreme Court in *Branzburg v. Hayes*[88] that newsmen have no privilege to refuse divulgence of their sources' names to a grand jury. *Branzburg*, though dealing exclusively with news gathering and not (as is the situation in *Bursey*) with publishing and distributing,[89] contains language which could possibly be applied to reverse the *Bursey* decision or similar subsequent cases.

80. *Id.* at 1087.

81. Talley v. California, 362 U.S. 60 (1960).

82. Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938); *accord*, Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943).

83. Smith v. California, 361 U.S. 147 (1959); *accord*, Burstyn v. Wilson, 343 U.S. 495 (1952); Winters v. New York, 333 U.S. 507 (1948); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

84. Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

85. Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); *accord*, Craig v. Harney, 331 U.S. 367 (1947); Bridges v. California, 314 U.S. 252 (1941); *cf.* Rideau v. Louisiana, 373 U.S. 723 (1963).

86. Zemel v. Rusk, 381 U.S. 1 (1965).

87. Associated Press v. N.L.R.B., 301 U.S. 103 (1937).

88. 408 U.S. 665 (1972).

89. According to the court in *Bursey*, "[t]wo basic ingredients of press freedom are liberty to decide what to print and to distribute what is printed." Bursey v. United States, 466 F.2d 1059, 1084-85 (9th Cir. 1972). In a footnote to that statement, the court added, "[a] third element of the freedom of press, the freedom to gather news, is not involved in this case." *Id.* at 1085 n.18.

Essentially, *Branzburg* eliminated the concept of a newsman's privilege[90] to protect confidential sources in a good faith investigatory proceeding. In such a proceeding, the newsman's rights are simply those of an ordinary citizen subpoenaed to testify.[91] In noting the impracticability of courts operating within a newsman's privilege, the Court said:

> We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely

90. Actually, the existence of such a concept, outside of statute, is not recognized by the vast majority of federal and state courts. The federal courts' position on the privilege was established by Judge (now Justice) Stewart of the Second Circuit in Garland v. Torre, 259 F.2d 545 (2d Cir. 1958). In requiring that a columnist reveal the source of her article, the court said: "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice." *Id.* at 549. This holding has been followed by the majority of federal courts. *E.g.*, Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969); Brewster v. Boston Herald-Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957). *But see In re* Lyons, 99 F. Supp. 629 (S.D.N.Y. 1951); *Ex parte* Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953) (involving a state shield statute).

The bulk of the cases on this question have been in state courts, and decisions have been overwhelmingly against the recognition of the privilege. In State v. Buchanan, 250 Ore. 244, 436 P.2d 729 (1968), the Oregon Supreme Court, in denying the privilege to a university newspaper reporter said, "it would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal-privileges and equal-protection concepts also found in the Constitution." *Id.* at 248-249, 436 P.2d at 731. Other state court cases reaching like results are: *In re* Wolf, 69 Misc. 2d 256, 329 N.Y.S.2d 291 (Sup. Ct. 1972); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); Beecroft v Point Pleasant Printing & Publishing Co., 82 N.J. Super. 269, 197 A.2d 416 (Super. Ct. 1964) (involving interpretation of a shield statute); *In re* Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961); Clein v. State, 52 So. 2d 117 (Fla. 1950); People *ex rel.* Mooney v. Sheriff, 269 N.Y. 291, 199 N.E. 415 (1936); Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); *In re* Grunow, 84 N.J.L. 235, 85 A. 1011 (Sup. Ct. 1913); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781 (1911); *Ex parte* Lawrence, 116 Cal. 298, 48 P. 124 (1897); Pledger v. State, 77 Ga. 242, 3 S.E. 320 (1887); People *ex rel.* Phelps v. Fancher, 9 N.Y. (2 Hun.) 226 (1874). *But see In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963) (state's shield statute protected reporter). For an analysis of the arguments favoring a newsman's privilege see Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969). For a general look at state shield statutes, see Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

91. Branzburg v. Hayes, 408 U.S. 665 (1972).

> pamphleteer . . . just as much as of the large metropolitan publisher . . . .[92]

The effect of this decision on the "substantial relation" doctrine, partially employed by the *Bursey* court, was illustrated by the Court. *Caldwell v. United States*,[93] one of the cases brought to the Supreme Court under the *Branzburg* title, was a Ninth Circuit case involving a *New York Times* reporter. Caldwell had refused to divulge information gained in interviews with Black Panthers to a grand jury investigating a possible plot to assassinate President Nixon. Explaining the effect of the substantial relation doctrine, as modified by *Branzburg*, the Court said:

> [I]t is quite apparent (1) that the State has the necessary interest . . . in forestalling assassination attempts on the President . . . and (2) that, based on the stories . . . Caldwell wrote . . . the grand jury called [him] as they would others—because it was likely that [he] could supply information to help the Government determine whether illegal conduct had occurred and, if it had, whether there was sufficient evidence to return an indictment.[94]

The test in *Bursey* not only employed the substantial relation doctrine but added to it a further requirement of intent. The facility with which *Branzburg* appears to pierce the substantial relation doctrine as it applies to reporters has ominous implications as to that same doctrine as it applies to publishing and distributing, especially where a showing of intent is also required.[95] Application of *Branzburg* might weaken *Bursey* for example on the grounds that those on the newspaper's staff were so closely connected with the Black Panther Party that they might reasonably be expected to have information relating to an assassination plot. To this extent then, it appears that *Bursey*'s reliance on freedom of the press to deny the Government access to

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92. *Id.* at 703-04.

93. 434 F.2d 1081 (9th Cir. 1970). In addition to *Caldwell*, two other cases were included in the *Branzburg* decision. *In re* Pappas, 266 N.E.2d 297 (Mass. Sup. Ct. 1971) and Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App. 1971).

94. Branzburg v. Hayes, 408 U.S. 665, 701 (1972).

95. A further indication that *Branzburg* might adversely affect cases similar to *Bursey* is seen in the emphasis *Bursey* places on distinguishing the government's compelling interest in the subject matter of the *investigation* with its compelling interest in the subject matter of *each disputed question*. The *Bursey* court said: "The fact alone that the Government has a compelling interest in the subject matter of a grand jury investigation does not establish that it has any compelling need for the answers to any specific questions." 466 F.2d at 1086. On the other hand, *Branzburg* makes no reference to requiring a compelling interest in the subject matter of each question. Indeed, as seen in text cited at note 94 *supra*, the Court seems ready to require only a very general showing by the government that it has a compelling interest in the subject matter of the investigation.

information about the *Black Panther Newspaper* may no longer be effective.[96]

On the other hand, *Branzburg*'s dilution of the freedom of association doctrine is less clear. There are several Supreme Court cases on the right of associational privacy vis-à-vis investigative bodies[97] and, to a qualified extent,[98] establishing the predominance of that right over the needs of the investigative bodies. In contrast, there have been numerous cases rejecting the predominance of freedom of the press in both state and federal investigatory proceedings.[99] For these reasons, the constitutional privilege of freedom of association currently appears to be on firmer ground than the privilege, often analogous, concerning freedom of the press. It is therefore probable that the doctrine of associational privacy would serve as a more persuasive basis for the *Bursey* decision than the grounds actually employed.

Conclusion

The validity of the foregoing discussion concerning First Amend-

96. It is, of course, impossible to make a valid prediction on this point. Anyone who would hazard a guess as to what the Supreme Court will do with a case similar to *Bursey* in the wake of *Branzburg* builds his house upon a foundation of sand. The recent history of the Supreme Court provides ample supportive evidence. *Compare* Levy v. Louisiana, 391 U.S. 68 (1968) *with* Labine v. Vincent, 401 U.S. 532 (1971) (dealing with the rights of illegitimate children to inherit as legitimate children); *compare* Dombrowski v. Pfister, 380 U.S. 479 (1965) *with* Younger v. Harris, 401 U.S. 37 (1971) (dealing with federal court intervention into state court proceedings). The author, therefore, offers these inferences with the appropriate caveat.

97. See note 75 *supra.*

98. The qualification lies in those cases where investigations of the Communist Party had raised the spectre of First Amendment infringements. *See, e.g.,* Braden v. United States, 365 U.S. 431 (1961); Wilkinson v. United States, 365 U.S. 399 (1961); Barenblatt v. United States, 360 U.S. 109 (1959). The United States Supreme Court showed less solicitude for appellants in these cases than for those where so-called legitimate (as distinct from "subversive") organizations were being harrassed. It appears that the decisions allowing infringements of associational privacy in the Communist Party cases should not be allowed to dilute the holdings disallowing such infringements in other types of associational privacy cases, especially in light of Mr. Justice Goldberg's majority opinion in Gibson v. Forida Legislative Investigation Comm., 372 U.S. 539 (1963): "Applying these principles to the facts of this case, the respondent Committee contends that the prior decisions of this Court [citations omitted] compel a result here upholding the legislative right of inquiry. In *Barenblatt, Wilkinson,* and *Braden,* however, it was a refusal to answer a question or questions concerning the witness' *own* past or present membership *in the Communist Party* which supported his conviction. It is apparent that the necessary preponderating governmental interest and, in fact, the very result in those cases were founded on the holding that the Communist Party is not an ordinary or legitimate political party, as known in this country, and that, because of its particular nature, membership therein is *itself* a permissible subject of regulation and legislative scrutiny." *Id.* at 547.

99. See cases cited in note 90 *supra.*

ment rights will depend upon the extent to which the Supreme Court applies the broad language of *Branzburg*. Determination of this point may rest squarely on the shoulders of Mr. Justice Powell, who, in the five to four decision, wrote the concurring opinion which may prove to have a moderating effect upon future Supreme Court decisions in this field. Mr. Justice Powell wrote at one point in his concurrence:

> Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered.[100]

Although this statement indicates Justice Powell's predilection toward the newsman's First Amendment rights, it still leaves in doubt just how "substantial" a "relation" must exist between the subject matter of a grand jury's investigation and the information it seeks to elicit before a newsman will be required to breach his confidences. The degree to which *Branzburg* has modified this "substantial relation" doctrine will affect its application to analogous cases like *Bursey*.

It has been suggested in this note that the language in *Branzburg* could affect the *Bursey* decision adversely to witnesses Bursey and Presley. This analysis was predicated upon the fact that no definitive decisions have been made by the Supreme Court establishing the dominance of freedom of the press where it clashes with investigative bodies.[101] It must further be based on the solicitude shown by the Court in the past to grand jury powers.[102] In denying a petition for

100. Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

101. See note 75 *supra*.

102. The extent of the power allowed a grand jury is a subject on which much has been written. Generally, the following principles have been established concerning grand jury procedures: witnesses subpoenaed need not be informed as to whom or what the grand jury is investigating (Hale v. Henkel, 201 U.S. 43, 65 (1906)); witnesses cannot object to irrelevancy of questions or challenge the authority of the grand jury (Blair v. United States, 250 U.S. 273, 282 (1919)); a court cannot restrict the scope of inquiry of the grand jury (Blair v. United States, 250 U.S. 273 (1919)); a witness has no right to have counsel present in the grand jury chambers (*In re* Groban, 352 U.S. 330 (1956) (dealing with a fire marshall's investigation)); the grand jury's proceedings are kept secret (*In re* Grand Jury Proceedings, 4 F. Supp. 283 (E.D. Pa. 1933)); and witnesses' First Amendment rights are severely restricted (see cases cited in note 60 *supra*). *Contra*, Evans v. United States, 452 F.2d 1239 (D.C. Cir. 1971); *In re* Grand Jury Proceedings, Harrisburg, Pa., 450 F.2d 199 (3d Cir. 1971) (Fourth Amendment objections by witnesses upheld); *see In re* Russo, 53 F.R.D. 564 (C.D. Cal. 1971) (dictum). A number of articles have explored the subject. *E.g.*, Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965); Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 JOHN MARSH. J. PRAC. & PROC. 18 (1967); Comment, *The Rights of a Witness Before a Grand Jury*,

rehearing of the *Bursey* case, however, the Ninth Circuit Court of Appeals said:

> Although there is some language in Mr. Justice White's opinion in *Branzburg* . . . implying that a grand jury investigation carries with it ingredients that may favor balance for the Government as against the First Amendment, the passage does not purport to disavow the balancing standards enunciated in such cases as DeGregory v. Attorney General of New Hampshire . . . .[103]

Despite this optimism, however, the validity of the substantial relation doctrine is very much in question not only as to newsmen and their sources, but also as to all areas included in freedom of the press and freedom of association. Until Congress establishes definite guidelines in this area or until the case law becomes more extensive, this uncertainty will continue to reign.

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1967 DUKE L.J. 97; Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961).

103. Bursey v. United States, 466 F.2d 1059, 1091 (9th Cir. 1972) (opinion on petition for rehearing).

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